

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
NEW 3 NYCRR 120
COMPLIANCE WITH BANKING LAW SECTION 28-BB**

I, Adrienne A. Harris, Superintendent of Financial Services, pursuant to the authority granted by Banking Law sections 9-d, 28-bb, 590, 596, and 597; Financial Services Law sections 202, 301, and 302; and Executive Law section 296-a, do hereby promulgate the addition of new Part 120 to, Title 3 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to take effect upon publication of the Notice of Adoption in the State Register, to read as follows:

(All of the following material is new)

A new Part 120 is added as follows:

PART 120

COMPLIANCE WITH BANKING LAW SECTION 28-bb

Sec.

- 120.1 Definitions
- 120.2 Data collection and reporting
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Section 120.1 Definitions

For purposes of this Part, the following definitions apply:

(a) Area median income means:

(1) the median family income for the metropolitan statistical area (MSA), as defined in subdivision (n) of this section, if a person or geography is located in an MSA, or for the metropolitan division as defined in subdivision (k) of this section, if a person or geography is located in an MSA that has been subdivided into metropolitan divisions; or

(2) the statewide nonmetropolitan median family income, if a person or geography is located outside an MSA.

(b) Assessment area shall mean a geographic area delineated in accordance with section 120.5 of this Part.

(c) Branch shall mean a staffed facility approved as a branch office under section 591 of the Banking Law.

(d) Community development means:

(1) mortgage products and other efforts to assist with affordable housing, including multifamily rental housing, for low- or moderate-income individuals;

(2) mortgage products made as part of a special purpose credit program, as defined in subdivision (p) of this section;

(3) community services targeted to low- or moderate-income individuals;

(4) activities that revitalize or stabilize:

(i) low- or moderate-income geographies;

(ii) designated disaster areas; or

(iii) distressed or underserved nonmetropolitan middle-income geographies designated by the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, based on:

(a) rates of poverty, unemployment, and population loss; or

(b) population size, density, and dispersion. Activities revitalize and stabilize geographies designated based on population size, density, and dispersion if they help to meet essential community needs, including needs of low- and moderate-income individuals;

(5) activities that seek to prevent defaults and/or foreclosures on loans included in paragraph (1) of this subdivision.

(e) Community development service means a service that:

(1) has as its primary purpose community development; and

(2) is related to the provision of financial services.

(f) Community outreach means an activity that provides products and services to any populations, including but not limited to economically disadvantaged persons, who might not otherwise have access to those products and services or who use such products and services at lower rates relative to other populations.

(g) Geography means a census tract delineated by the United States Bureau of the Census in the most recent decennial census.

(h) HMDA means the Home Mortgage Disclosure Act and its implementing regulations.

(i) Income level includes:

(1) Low-income, which means an income that is less than 50 percent of the area median income, in the case of an individual, or a median family income that is less than 50 percent of the area median income, in the case of a geography.

(2) Moderate-income, which means an income that is at least 50 percent and less than 80 percent of the area median income, in the case of an individual, or a median family income that is at least 50 and less than 80 percent of the area median income, in the case of a geography.

(3) Middle-income, which means an income that is at least 80 percent and less than 120 percent of the area median income, in the case of an individual, or a median family income that is at least 80 and less than 120 percent of the area median income, in the case of a geography.

(4) Upper-income, which means an income that is 120 percent or more of the area median income, in the case of an individual, or a median family income that is 120 percent or more of the area median income, in the case of a geography.

(j) Loan location means the geographic location of the property to which a mortgage loan relates.

(k) Metropolitan division means a metropolitan division as defined by the Director of the Office of Management and Budget.

(l) Mortgage banker means a person or entity licensed pursuant to section 591 of the Banking Law to engage in the business of making mortgage loans in New York State.

(m) Mortgage loan has the same meaning as in section 590 of the Banking Law.

(n) MSA means a metropolitan statistical area as defined by the Director of the Office of Management and Budget.

(o) Qualified investment means a lawful investment, deposit, membership share, or grant that has as its primary purpose community development.

(p) Special purpose credit program means any credit program offered by a mortgage banker to meet special social needs which is in conformity with and explicitly authorized by the Equal Credit Opportunity Act (15 U.S.C. § 1691(c)) and Regulation B (12 C.F.R. § 1002.8).

(q) Superintendent means the Superintendent of Financial Services.

Section 120.2 Data collection and reporting

(a) Each mortgage banker shall file with the superintendent, upon request, a copy of each report and document which it is required to prepare and/or file with one or more Federal, State, or local agencies and which relates to the credit needs of its community. Such documents shall include, but not be limited to, any data

and/or supporting materials prepared or submitted for the purposes of compliance with HMDA or any other Federal, State, or local requirement. Nothing in this Part shall preclude the superintendent from requiring the submission of additional information and/or data which they deem necessary to evaluate an institution.

(b) Each mortgage banker shall test its collection and reporting of data, including of its HMDA data, as part of its routine internal controls to ensure the completeness and accuracy of its data and compliance with all data reporting requirements as well as its own policies and procedures.

(c) Optional data reporting. At its option, a mortgage banker may provide other information concerning its performance meeting the credit needs of its community, such as additional mortgage loan distribution data.

Section 120.3 Review of applications

(a) The superintendent will consider the factors set forth in section 28-bb of the Banking Law and the performance tests and standards set forth in section 120.6 of this Part in assessing a mortgage banker's record of performance in meeting the credit needs of its community.

(b) When taking any action on any application made by a mortgage banker, including an application to open and maintain a branch office made pursuant to section 591 of the banking law and a change of control application made pursuant to section 594-b of the Banking Law, the superintendent shall take into account, among other factors, such assessment of the mortgage banker's record of performance, if any, as set forth in this Part, in helping to meet the credit needs of its entire community, including low and moderate income neighborhoods and consistent with safe and sound operation of the mortgage banker.

(c) The superintendent may deny any such application on the basis of the assessment. Furthermore, the superintendent may condition the approval of any application as the facts and circumstances warrant.

Section 120.4 Performance evaluations; public disclosure

(a) From time to time, as determined by the superintendent, the department will evaluate the record of performance in helping to meet the credit needs of the community of each mortgage banker who has originated 200 or more mortgage loans in New York State in the last calendar year reportable under HMDA. The evaluation shall be conducted pursuant to section 28-bb of the Banking Law and the tests set forth in section 120.6 of this Part. The department will assign a rating for a mortgage banker reflecting the department's assessment of the mortgage banker's record of helping to meet the credit needs of the community. In general, a mortgage banker that received an "Outstanding" on its most recent evaluation will be evaluated less frequently than a mortgage banker that received a lower rating, unless the department has cause to conduct an evaluation more frequently.

(b) In conducting an evaluation of a mortgage banker under this Part, the department may perform its evaluation on-site at the institution or at the department; require the submission of written responses to department requests for documentation and other information, including responses to the so-called "First Day Letter" or similar requests; interview mortgage banker personnel; conduct branch visits; and require any other information or documentation, or utilize any other procedure that the superintendent deems necessary. The

department may rely, in part, on any similar evaluation by another state, commonwealth, or territory or upon any similar evaluation by the appropriate Federal regulatory authorities of a mortgage banker.

(c) The lending and service performance for each mortgage banker evaluated under paragraph (1) of subdivision (a) of section 120.6 of this Part shall be assigned one of the four following ratings: Outstanding, Satisfactory, Needs to Improve, or Substantial Noncompliance. A mortgage banker's performance need not fit each aspect of a particular rating profile for the mortgage banker to receive that rating, and exceptionally strong performance with respect to some aspects may compensate for weak performance in others. The mortgage banker's overall performance must be consistent with safe and sound business practices and generally consistent with the appropriate rating profile. The department's assessment shall form the basis of the numerical rating based on a 1-4 scoring system assigned to each such mortgage banker by the department. Specifically, such numerical scores shall represent performance assessments as follows:

(1) outstanding record of meeting the credit needs of the community ("Outstanding" or "1");

(2) satisfactory record of meeting the credit needs of the community ("Satisfactory" or "2");

(3) needs to improve record of meeting the credit needs of the community ("Needs to Improve" or "3");
and

(4) substantial noncompliance in meeting the credit needs of the community ("Substantial Noncompliance" or "4").

(d) Evidence of discriminatory or other illegal credit practices.

(1) The department's evaluation of a mortgage banker's performance in meeting the credit needs of the community is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the mortgage banker. In connection with any type of lending activity described in subdivision (a) of section 120.7 of this Part, evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:

(i) discrimination against applicants on a prohibited basis in violation, for example, of section 296-a of the New York State Executive Law, the Equal Credit Opportunity Act, or the Fair Housing Act;

(ii) violation of either section 6-1 of the Banking Law or the Home Ownership and Equity Protection Act;

(iii) violation of section 5 of the Federal Trade Commission Act;

(iv) violation of section 8 of the Real Estate Settlement Procedures Act; and

(v) violation of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (1) of subdivision (d) of this section on the mortgage banker's assigned rating, the department considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the mortgage banker has in place to prevent the

practices; any corrective action that the mortgage banker has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and other relevant information.

(e) The department will prepare a written summary of the results of its assessment, and the rating and the written summary will be made available to the public.

Section 120.5 Assessment area

(a) In general. A mortgage banker shall delineate one or more assessment areas within New York State, under the criteria specified in this section, within which the department evaluates the mortgage banker's record of helping to meet the credit needs of its community. Where the mortgage banker has discretion with respect to the establishment of its assessment area(s), the department does not evaluate the mortgage banker's delineation of its assessment area(s) as a separate performance criterion, but the department reviews the delineation for compliance with the requirements of this section.

(b) Branch-based assessment areas. A mortgage banker with one or more branches within New York State shall delineate one or more branch-based assessment areas for evaluating performance.

(1) Geographic area(s). Branch-based assessment area(s) must:

(i) consist generally of one or more MSAs or metropolitan divisions (using the MSA or metropolitan division boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns, in addition to any geographic requirements for assessment areas in this section; and

(ii) include each county in which a mortgage banker has a branch, as well as the surrounding geographies in which the mortgage banker has originated or purchased a substantial portion of its mortgage loans.

(2) Adjustments to geographic area(s). A mortgage banker may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An adjustment is particularly appropriate in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.

(3) Limitations on the delineation of an assessment area. Each mortgage banker's assessment area(s):

(i) must consist only of whole geographies;

(ii) may not reflect illegal discrimination; and

(iii) may not arbitrarily exclude low- or moderate-income geographies, taking into account the mortgage banker's size and financial condition.

(4) Each branch-based assessment area delineated by the mortgage banker is subject to the lending test and the service test, as provided in sections 120.7 and 120.8 of this Part.

(c) Assessment areas for mortgage bankers without branches. A mortgage banker with no branches within New York State shall specify one or more of its lending-based assessment areas to be subject to the lending test and the service test, as provided in sections 120.7 and 120.8 of this Part, consistent with meeting the credit needs of the community.

(d) In the event of an evaluation of a mortgage banker with no branches within New York State has not originated, in each of the two preceding calendar years, at least 100 mortgage loans in any MSA or nonmetropolitan area of New York State, that mortgage banker shall be subject to the lending test and the service test, as provided in sections 120.7 and 120.8 of this Part, in the MSA or nonmetropolitan area of New York State in which that mortgage banker originated the greatest number of mortgage loans over the two preceding calendar years.

(e) Lending-based assessment areas. A mortgage banker must delineate a lending-based assessment area in each MSA or nonmetropolitan area of New York State, respectively, in which it originated, in each of the two preceding calendar years, at least 100 mortgage loans outside of branch-based assessment areas.

(1) Geographic requirements regarding lending-based assessment areas. A lending-based assessment area must consist of either:

(i) the entirety of a single MSA within New York State, excluding areas inside branch-based assessment areas; or

(ii) all of the areas in New York State that are not included in an MSA, excluding areas inside branch-based assessment areas, aggregated into a single lending-based assessment area.

(2) Each lending-based assessment area delineated by the mortgage banker is subject to the lending test, as provided in section 120.7 of this Part.

(f) Use of assessment area(s). The department uses the assessment area(s) delineated by a mortgage banker in its evaluation of the mortgage banker's performance unless the department determines that the assessment area(s) do not comply with the requirements of this section.

(g) Nothing in this section shall be construed to impose a requirement on any mortgage banker to locate any branch in a specific geographical area.

Section 120.6 Performance tests

(a) Performance tests. The department assesses the performance of mortgage bankers at meeting the credit needs of its community by applying the lending and service tests, as provided in sections 120.7 and 120.8 of this Part.

(b) Performance context. The department will apply the tests in subdivision (a) of this section in the context of:

(1) demographic data including median income levels, distribution of household income, housing data, and any other relevant data pertaining to a mortgage banker's assessment area(s);

(2) the performance of all mortgage lenders, including banking institutions as defined in Part 76 of this Title, in the mortgage banker's assessment area(s);

(3) lending and service opportunities in the mortgage banker's assessment area(s);

(4) the mortgage banker's product offerings and business strategy;

(5) the mortgage banker's institutional capacity and constraints;

(6) the mortgage banker's past performance;

(7) the mortgage banker's market share in its assessment area;

(8) community input; and

(9) any other information deemed relevant by the department.

Section 120.7 Lending test

(a) Scope of test. The scope of the lending test is as follows:

(1) The lending test evaluates a mortgage banker's record of helping to meet the credit needs of its assessment area(s) through home mortgage lending activity.

(2) The department considers originations and purchases of mortgage loans as reported by the mortgage banker under HMDA. The department may also consider any other mortgage loan data the mortgage banker may provide.

(b) Performance criteria. The department evaluates a mortgage banker's lending performance pursuant to criteria which may include the following:

(1) Lending activity. The number and amount of the mortgage banker's mortgage loans in the mortgage banker's assessment area(s).

(2) Geographic distribution. The geographic distribution of the mortgage banker's mortgage loans based on the loan location, including:

(i) the proportion of the mortgage banker's lending in the mortgage banker's assessment area(s);

(ii) the dispersion of lending in the mortgage banker's assessment area(s); and

(iii) the number and amount of mortgage loans in low-, moderate-, middle-, and upper-income geographies in the mortgage banker's assessment area(s).

(3) Borrower characteristics. The distribution, particularly in the mortgage banker's assessment area(s), of the mortgage banker's mortgage loans based on borrower characteristics, including the number and amount of mortgage loans to low-, moderate-, middle-, and upper-income individuals.

(4) Innovative or flexible lending practices. The mortgage banker's use of innovative or flexible lending practices, in a safe and sound manner, to address the credit needs of low- or moderate-income individuals or geographies, or underserved individuals or geographies, including governmentally insured, guaranteed, or subsidized loan programs for housing, as appropriate for each borrower.

(5) Harmful practices. A mortgage banker's rating on the lending test may be adversely affected by harmful practices such as those intended to discourage application for or extension of credit offered by the mortgage banker or which may result in harm to low- and moderate-income individuals.

(6) Third-party lending. No mortgage banker may include a mortgage loan origination for consideration if another mortgage banker or depository institution claims the same mortgage loan origination under this Part, under section 28-b of the Banking Law or its implementing regulations, or under the federal Community Reinvestment Act.

Section 120.8 Service test

(a) Scope of test. The service test evaluates a mortgage banker's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a mortgage banker's systems for delivering mortgage loan products and the extent and innovativeness of a mortgage banker's community development services, qualified investments, community outreach, marketing, and educational programs.

(b) Area(s) benefited. Community development services and qualified investments must benefit a mortgage banker's assessment area(s) or a broader area within New York State that includes the mortgage banker's assessment area(s).

(c) Performance criteria for community development services. The department evaluates community development services pursuant to criteria which may include the following:

(1) the extent to which the mortgage banker provides community development services;

(2) the innovativeness and responsiveness of community development services; and

(3) the range of services provided, and the degree to which the services are tailored to meet the needs of low- and moderate-income geographies and individuals, and other underserved communities and individuals.

(d) Performance criteria for qualified investments. The Department evaluates qualified investment performance pursuant to criteria which may include the following:

(1) the dollar amount of qualified investments;

(2) the innovativeness or complexity of qualified investments;

- (3) the responsiveness of qualified investments to credit and community development needs; and
- (4) the degree to which the qualified investments are not routinely provided by private investors.

(e) A mortgage banker shall not be required to make qualified investments to achieve any rating on the service test.

(f) The service test includes an evaluation of the extent and nature of the mortgage banker's marketing activities, if any, relative to the mortgage banker's available resources.

Section 120.9 High cost areas

(a) The department recognizes that the demographics and housing characteristics of an area may be such that the gap between housing costs and area median income greatly restricts the affordability of owner-occupied housing for low- and moderate-income persons residing in such an area. At the same time, there may exist a shortage of credit which endangers the preservation, stabilization, or improvement of middle-income geographies or limits access to credit for middle-income persons residing in such an area. Where, based on relevant, current, and verifiable data (including but not limited to the most recent census data pertaining to such area) these conditions are found to exist, the department may, in its assessment of the mortgage banker's performance, be flexible in its consideration of a mortgage banker's activities pertaining to owner-occupied housing in middle-income geographies or for middle-income individuals residing in such an area.

(b) Consideration of such activities shall be in addition to, and not in lieu of, consideration of activities in low- or moderate-income geographies and activities which serve low- or moderate-income individuals.

Section 120.10 Compliance date and transitional period

The compliance date for this Part is six months after the date of publication of the Notice of Adoption in the State Register.